TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~516~~ 6867

ANDREW J. BEAN, PLAINTIFF,

vs.

DANIEL N. BECKWITH AND GILMAN HENRY.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

FILED DECEMBER 11, 1871.



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1 United States circuit court for the district of Vermont.

ANDREW J. BEAN
vs.
DANIEL N. BECKWITH & GILMAN HENRY.

Be it remembered that, at a term of the circuit court of the United States begun & holden at Windsor, in and for the Vermont district, in the second circuit, on the fourth Tuesday of July, A. D. 1866, comes Daniel N. Beckwith & Gilman Henry, by their attorney, Hon. D. C. Denison, and bring into court now here, an exemplified copy of the record from the county court within & for the county of Orleans, in the State and district of Vermont, which said record is in the words and figures, following:

STATE OF VERMONT, *Orleans County, ss:*

To any sheriff or constable in the State, greeting:

By the authority of the State of Vermont, you are hereby commanded to attach the goods, chattels, or estate of Daniel N. Beckwith, of Sutton, in Caledonia County, and Gilman Henry, of Woodstock, in
2 the county of Windsor, to the value of fifty thousand dollars, and them notify thereof, according to law; and also notify them to appear before the county court next to be held at Irasburgh, within & for the county of Orleans, on the fourth Tuesday of December, A. D. 1865, then and there to answer to Andrew Jackson Bean, of Glover, in the county of Orleans, in a plea of tresspass, for that the defendants heretofore, to wit, on the eleventh day of November, A. D. 1864, at Newbury, in the county of Orange, with force & arms, assaulted the pl'ff, and seized him by force and against his will, carried him to Windsor, in the county of Windsor, and violently forced him within the State's prison at said Windsor, and confined him within a dark and loathsome cell, then and there constructed for theives, burglars, and other convicts, and then and there beat & bruised pl'ff with fists & clubs, restrained him within said cell & deprived him of his liberty, and insulted
3 him, so confined in said dungeon, for the space of seven months, by which means pl'ff's health was destroyed and his life despaired of, and suffered distress and anguish for the loss of liberty and the disgrace and ignominy of such long confinement among wretched convicts, and great pecuniary loss, to wit, five thousand dollars, by reason of being thus taken from his business & confined in said prison for said seven months.

And the pl'ff avers that the defendant, when pl'ff was so confined in said cell and prison, for the purpose of extorting money from the pl'ff, wickedly & maliciously threatened the pl'ff, that they would inflict or cause to be inflicted greater injuries upon the pl'ff unless he would pay them a great sum of money, to wit, eight hundred dollars, and other enormities the defendants to the pl'ff then & there did, against the peace, and

To the damage of the pl'ff, fifty thousand dollars, for the recovery of which, with just costs, this suit is brought. Fail not, but make service and return according to law.

4 Dated at Irasburgh, in the county of Orleans, the 3d day of August, A. D. 1865.

N. CUSHMAN, *Clerk.*

[50-cents stamp. N. C., clerk. Aug. 5, 1865.]

REC. 516—1

N. T. Sheafe recognised to the defendants in the sum of twenty dollars as surety for costs of prosecution as the law directs.

Before me.

I. N. CUSHMAN, *Clerk.*

STATE OF VERMONT, *Caledonia County, ss:*

At Sutton, on this 11th day of August, A. D. 1865, by virtue of this writ, I attached, as the property of the within-named defendant, all the real estate in the town of Sutton, with the appurtenances thereto belonging; also, all the hay & grain in the barns and sheds on said defendant Beckwith's farm; and on this same day I left a true & attested copy of this attachment, with a description of the estate so attached, endorsed thereon, in the town clerk's office of said town of Sutton.

5 Also, on this same day, I made further service of this writ, by attaching, as the property of the defendant Beckwith, two horses, one hundred sheep, one cow, three harnesses, also one single wagon; and, on this same day I delivered to the said defendant Beckwith, a true and attested copy of this writ, with a list of the property so attached endorsed hereon, *thereon endorsed.*

And now, on this 12th day of August, A. D. 1865, at Woodstock, in the county of Windsor, I made further service of this writ by attaching, as the property of Gilman Henry, one of the within-named defendants, all the real estate in the town of Woodstock, with the appurtenances thereto belonging; also, all the hay in the barns on the premises where the said defendant Henry now lives; and on the same day I left a true & attested copy of this attachment, with a description of the estate so attached endorsed thereon, in the town clerk's office of said town of Woodstock; and on the same day I left a true and attested copy of this attachment, with a list of the property so attached endorsed thereon, at the house of the then usual abode of said defendant,

6 in the hands of William D. Henry, a person of sufficient discretion, then resident therein.

Attest: S. G. BEAN,
Dept. Sheriff.

T., 204 miles, $12.24; 4 copies, 8.00; securing property, 4.00; fees paid T. clerks, 40—$24.64.

(Indorsed:) A. J. Bean vs. Daniel N. Beckwith & Gilman Henry. Orleans County court. December term, 1865. Sheafe & Redfield, att'ys.

Pl'ff's costs.

Writ	2 00
Service	24 64
Travel & entry	1 98
Term fee	2 00
Att'y' fee	3 00
Court fee	2 83
	$36 45
Copies sent to U. S. court. P'd for by def'ts	5 00
	$41 45

Tax'd as above.

I. N. CUS'MAN, *Clerk.*

7 In Orleans Co. court. December term, A. D. 1865.

A. J. BEAN
vs.
D. N. BECKWITH & GILMAN HENRY.

Defendants' petition to remove the aforesaid cause to the United States circuit court.

To the hon. Orleans County court now in session:

Your petitioners, Daniel N. Beckwith, of Sutton, in Caledonia County, and Gilman Henry, of Woodstock, in the county of Windsor, at the time of entering their appearance in the above-entitled cause in said Orleans County court, and at the term of said court to which the said cause is made returnable, come & show to the said court that, on the 3d day of August, A. D. 1865, the said Andrew J. Bean, of Glover, in the county of Orleans aforesaid, prayed out his writ of attachment of that date against your petitioners, signed by I. N. Cushman, clerk, made returnable before said Orleans County court, to be holden at Irasburgh, within & for said county, on the 4th Tuesday of
8 December, A. D. 1865, declaring in a plea of trespass for an assault, battery, and imprisonment of the said Bean by your petitioners, and demanding in damages the sum of fifty thousand dollars, and which was duly served on your petitioners, & entered in Orleans County court, which cause is now pending therein, as from said writ remaining among the files of said county court will more fully appear.

And your petitioners further show that, as to the said supposed assault, battery, and imprisonment, or wrongs and injuries declared upon in the said declaration of the said Andrew J. Bean, they were done and committed by your petitioners during the present rebellion, and on or about the 11th day of November, A. D. 1864, at or near Wells River, in the town of Newbury, Vt., and thereafterwards at other places in said Vermont; all of which were done by virtue of and under authority derived from & exercised under the President of the United States and the acts of Congress.

9 And your petitioners further show that, at the time when the said supposed trespasses in the said declaration mentioned were committed by your petitioners, your petitioner Gilman Henry was provost marshal within and for the second congressional district of the State of Vermont, and your petitioner Daniel N. Beckwith was a deputy provost marshal within and for said district, and they were as such in the military service of the United States, subject to the rules and regulations adopted for the government of the bureau of the provost marshal general of the United States, and bound to obey the orders of their superior officers.

And your petitioners further show that, previous to and at the time when said supposed wrongs and injuries in the said declaration mentioned are alle*d*ged to have been committed by your petitioners, that he, the Andrew J. Bean, was supposed to have procured and enticed soldiers in the service of the United States to desert, and to have harbored and concealed, and carried away, or aided in carrying away, such de-
10 serters, knowing them to be such, contrary to the form, force, & effect of the statutes of the United States in such case made and provided, when your petitioners committed the supposed wrongs & injuries in the said declaration mentioned, and arrested & detained the

said Andrew J. Bean, as they lawfully might, and which was done under the authority aforesaid, and not otherwise.

And your petitioners say that they desire to have the cause so commenced as aforesaid against them by the said A. J. Bean, and pending in said Orleans County court, removed to the next circuit court of the United States, to be holden at Windsor, within and for the district of Vermont, on the 4th Tuesday of July, A. D. 1866; and your petitioners hereby offer good and sufficient surety, in such sum as the said county court shall order, for their filing in said circuit court, on the first day of its session, copies of the process in said action & proceedings thereon, and for their (your petitioners) appearance in said circuit court, & for entering special bail in said cause if required, as required by act
11 of Congress, approved March 3d, 1863.

And your petitioners pray said county court to accept surety, so offered as aforesaid, and so proceed no further in said cause, but to make such further order as may be necessary to remove said suit into said circuit court.

GILMAN HENRY.
DANIEL N. BECKWITH.

I, Gilman Henry, of Woodstock, in the county of Windsor, and State of Vermont, of lawful age, on oath say that the facts set forth & stated in the foregoing petition, subscribed by me, are according to truth.

GILMAN HENRY.

STATE OF VERMONT, *Windsor County, ss:*

At Woodstock, in said county, on the 22d day of December, 1865, personally appeared Gilman Henry and made oath that the facts set forth in his foregoing petition are true.

LEWIS PRATT,
Notary Public.

[5-cents rev. stamp. L. P. Dec. 22, '65.]

12 I, Daniel N. Beckwith, of Sutton, in the county of Caledonia, & State of Vermont, of lawful age, on oath say that the facts set forth & stated in the foregoing petition, subscribed by me, are acccording to truth.

DANIEL N. BECKWITH.

STATE OF VERMONT, *Orleans County, ss:*

At Irasburgh, in said county, on this 26th day of December, 1865, personally appeared Daniel N. Beckwith and made oath that the facts set forth in the foregoing affidavit are true.

W. J. HASTINGS,
Assistant Judge.

[5-cents rev. stamp. W. J. H. Dec. 26, 1865.]

I, Dudley C. Denison, of Royalton, in the county of Windsor, & State of Vermont, on oath, say that, on the 26th of December, 1865, I delivered to N. T. Sheafe, attorney of Andrew J. Bean, a true copy of the foregoing petition, together with a notice thereto attached, and which notice is in the words following, to wit: "The petitioner, Andrew J.
13 Bean, of Glover, in the county of Orleans, will take notice that the petition of which the foregoing is a true copy, will be brought

in for a hearing at the present term of Orleans County court (Dec. term, 1865,) by the petitioners.

"Irasburgh, Vt., Dec. 26, 1865.

"DUDLEY C. DENISON,
"*Att'y of Petitioner.*"

DUDLEY C. DENISON,
Att'y of Petitioner.

Subscribed and sworn to this 26th day of December, A. D. 1865.
W. J. HASTINGS,
Assistant Judge.

[5-cents rev. stamp. W. J. H. Dec. 26, 1865.]

(Indorsed:) Petition. Daniel N. Beckwith & Gilman Henry in case of Andrew J. Bean. Orleans County Court, Dec. term, 1865. Orleans County Court, Dec'r term, 1865. Rec'd & filed 1st day of term. Attest. I. N. Cushman, clerk.

14 Orleans County court, Dec'r term, 1865.

ANDREW J. BEAN
vs.
DANIEL N. BECKWITH & GILMAN HENRY.

The defendants in the above-entitled cause having filed their petition in this court, and at the present term thereof, praying that said cause be removed for trial to the next circuit court of the United States for the district of Vermont, which petition is duly verified by the affidavits of the defendants, and the said defendants offering good and sufficient surety for their filing in said circuit court, on the first day of its session, copies of the process in said suit, and other proceedings against them, and for the appearance of said defendants in said circuit court, & entering special bail therein, according to the provisions of an act of Congress, approved March 3d, 1863:

Therefore it is ordered by the court that the bond and security
15 of this date, so offered by the said defendants as aforesaid, be accepted and filed in said court for the benefit of said plaintiff, and that the said cause be removed to the circuit court of the United States in & for the district of Vermont, next to be holden at Windsor, in said district, on the fourth Tuesday of July, A. D. 1866.

Done in court this 26th day of December, A. D. 1865.
WILLIAM C. WILSON,
Presiding Judge.

STATE OE VERMONT,
Orleans County, ss:

I Isaac N. Cushman, clerk of the county court in and for the county of Orleans, in the State of Vermont, the same being a court of record, and having a seal, as hereto attached, do hereby certify that the above and foregoing is a true & correct copy of the process and other proceedings in the case, Andrew J. Bean vs. Daniel N. Beckwith and Gilman Henry, brought to and entered in said court, at a term thereof holden at Irasburgh, within and for said county, on the 4th Tuesday of December, A. D. 1865.

16 In witness whereof I have hereunto affixed the seal of said

court and subscribed my name, at Irasburgh in said county, this 3d day of July, A. D. 1866.

[L. S.] I. N. CUSHMAN, *Clerk.*

[5-cent int. rev. stamp. I. N. C.. clerk. July 3, 1866.]

STATE OF VERMONT,
Orleans County, ss:

I, William C. Wilson, judge of the supreme court of the State of Vermont and ex-officio chief & presiding judge of Orleans County court, the same being a court of record, & having a seal, do hereby certify that I. N. Cushman, who has signed the above certificate, was, at the time of signing the same, and still is, clerk of Orleans County court; that his signature thereto is genuine; that his attestation is in due form; & full faith is thereunto given in all the courts in this State; and that the seal thereunto affixed is the seal of said county court.

Given under my hand, at Irasburgh, in Orleans County, this 3d day of July, A. D. 1866.

WILLIAM C. WILSON,
Presiding Judge.

17 And thereupon, on motion of the attorney for said defendants, Daniel N. Beckwith and Gilman Henry, it was ordered that said cause be entered on the docket of this court, and it was so entered.

And afterwards, at said term, said cause was continued until the October term, A. D. 1866, of this court.

And afterwards, at said October term, 1866, said cause was continued until the July term, A. D. 1867, of this court.

And afterwards, at said July term, 1867, said cause was continued until the October term, A. D. 1867, of this court.

And afterwards, at said October term of this court, said cause was continued until the July term, 1868, of this court.

And afterwards, at the said July term, 1868, said cause was continued until the October term, A. D. 1868, of this court.

And afterwards, at said October term, 1868, said cause was continued until the July term, 1869, of this court.

And afterwards, at said July term, 1869, said cause was continued until the October term, 1869, of this court.

And afterwards, at said October term, 1869, said cause was
18 continued until the February term, A. D. 1870, of this court.

And afterwards, at said February term, 1870, said cause was continued to the July term, A. D. 1870, of this court.

And afterwards, on the 5th day of July, A. D. 1870, the said defendants, Beckwith and Henry, filed their pleas in said suit in the words and figures following:

United States circuit court, July T., 1869. Circuit of Vermont.

ANDREW J. BEAN
vs.
D. N. BECKWITH & GILMAN HENRY.

And now come the defendant', by their att'y, and defend, &c., when, &c., and say they are not guilty in manner and form as the pl'ff hath *hath* alleged; and thereupon put themselves upon the country.

B. F. FIFIELD, *Att'y.*

And for further plea in this behalf by leave of court first had & obtained these def'ts say the pl'ff ought to have and main-
19 tain his said action, because, they say that at the time of committing the said several alleged grievances in said declaration mentioned, and for a long time, to wit, one year before & after that time, a gigantic rebellion was in existence and on foot against the laws and Government of the United States, and the public safety was greatly jeopardized and imperiled; and these defendants further say that it then & there became necessary, and in fact large bodies of soldiers were raised in the Northern States, and more especially in military district embracing the second congressional district of Vermont, for the purpose of suppressing said rebellion and insuring the public safety; and these defendants further say that, at the time of said supposed grievances in said declaration mentioned, and for a long time, to wit, one year before and after that time, the def't Henry was a military officer in the service of the United States, to wit, a provost marshal within and for the military district em'racing said second congressional district of Vermont and the said Beckwith was, during the same time, an assistant
20 provost marshal in the same district, acting in aid of the said Henry in the performance of his duties as such provost-marshal. And these def'ts further say that, to wit, on the 20th day of Nov. A. D. 1869, to wit, at Newbury, in the county of Orange, & in said military district of the second congressional district of Vermont, the pl'ff then and there being charged with having been guilty of disloyal practices in aid of the then existing rebellion against the laws and Government of the United States, and with affording aid and comfort to the rebels against the authority of the United States, to wit, with enticing soldiers to desert from the Army of the United States, to wit, at Woodstock, in the county of Windsor, in said military district of the second congressional district of Vermont, to wit, on the 15th day of June, A. D. 1864, these def'ts, as such military officers, and not otherwise, did arrest the pl'ff on the charges aforesaid, these def'ts, at the time of said arrest, then and there having reasonable cause to suppose said charge was true; and these def'ts further say that, afterwards, to
21 wit, at Windsor, in the county of Windsor, in the military district aforesaid, they did deliver over the pl'ff to the keeper of the State prison at said Windsor for safe custody until he could be brought before the civil tribunals of the United States within and for the district of Vermont, on the charges aforesaid, where he was detained on the charges aforesaid until afterwards, to wit, on the 1st day of May, A. D. 1865, when, to wit, at Woodstock, in the county of Windsor, the pl'ff was brought before Warren C. French, he then being a United States commissioner within and for the judicial district of Vermont, and the pl'ff then and there being charged with the offences aforesaid, after a full hearing, was held to bail by said commissioner

for his appearance before the United States circuit court then next to be held at Windsor, on the 4th Tuesday of July, A. D. 1865, to answer to the charges aforesaid and to such things as might be then and there alleged against him, as by said commissioner's record will more fully appear; and these def'ts further say that, at and from the time of said arrest up to the 4th Tuesday of July, A. D. 1865, there was no
22 session of a United States circuit court nor of a grand jury in attendance upon any United States court within the district and circuit of Vermont; and these def'ts further say that, in making said arrest, imprisonment, and detention, the def't Henry acted in the military capacity of provost marshal as aforesaid, and the said Beckwith in aid of him, the said Henry, and not otherwise; and that the arrest, detention, and imprisonment of the pl'ff, as aforesaid, was made and done under the authority and order of the then President of the United States, to wit, Abraham Lincoln, since deceased, whose order, as Commander-in-chief of the Armies of the United States, by the rules and regulations of the Army these def'ts were bound to obey; and these def'ts further say that the supposed arrest, imprisonment, & grievances in said declaration mentioned, are the same arrest, imprisonment, and detention herein set forth, and none other: all which the def'ts are ready to verify.

Wherefore they pray judgement, &c.

By B. F. FIFIELD, *Att'y.*

23 And for further plea in this behalf, by leave of court first had and obtained, these def'ts say the pl'ff ought not to have and maintain his said action, because they say that, at the time of committing of the several alleged grievances in said declaration mentioned, and for a long time, to wit, one year before and after that time, a gigantic rebellion was in existence and on foot against laws and Government of the United States, and the public safety was greatly jeopardised and imperiled; and these def'ts further say that it then and there became necessary to raise, and in fact large bodies of soldiers were raised, in the Northern States, and more especially in the military district embracing the second congressional district of Vermont, for the purpose of suppressing said rebellion and insuring the public safety; and these defendants say that, at the time of said supposed grievances in said declaration mentioned, and for a long time, to wit, one year before and after that time, the def't Henry was a military officer in the service of the United States, to wit, a provost marshal within & for the
24 military district embracing said second congressional district of Vermont, and the said Beckwith was, during the same time, an assistant provost marshal in the same district, acting in aid of the said Henry in the performance of his duties as such provost marshal. And these def'ts further say that, to wit, on the 20 day of Nov., A. D. 1864, to wit, at Newbury, in the county of Orange, and in said military district of the second congressional district of Vermont, the pl'ff then and there being charged with having been guilty of disloyal practices in aid of the then existing rebellion against the laws and Government of the United States aforesaid, and with affording aid and comfort to the rebels against the authority of the United States, to wit, enticing soldiers to desert from the Army of the United States, to wit, at Woodstock, in the county of Windsor, in said military district of the second congressional district of Vermont, to wit, on the 15 day of June, A. D. 1864, these def'ts did arrest the pl'ff on the charges aforesaid; and afterwards, to wit, on the same day, to wit, at Windsor, in the county of

Windsor, in the military district aforesaid, they did deliver
25 over the pl'ff to the keeper of the State prison at said Windsor for safe custody until he could be brought before the civil tribunals of the United States within and for the district of Vermont on the charges aforesaid, where the pl'ff was detained on the charges aforesaid until afterwards, to wit, on the 1st day of May, A. D. 1865, where, to wit, at Woodstock, in the county of Windsor, the pl'ff was brought before Warren C. French, he then being a United States commissioner within and for the judicial district of Vermont, and the pl'ff being then & there charged with the offences aforesaid was held to bail for his appearance before the United States circuit court then next to be held at Windsor on the 4 Tuesday of July, A. D. 1865, to answer to the charges aforesaid and to such things as might be then and there alleged against him, as by said commissioner's record will more fully appear; and these def'ts further say that, at and after the time of the arrest up to the 4 Tuesday of July, A. D. 1865, there was no session of the United States circuit court nor of a grand jury in attend-
26 ance upon any United States court within the district and circuit of Vermont; and these def'ts further say that, in making said arrest, imprisonment, and detention, the def't Henry acted in his military capacity of provost marshal aforesaid, and the said Beckwith in aid of him, the said Henry, and not otherwise; and that the arrest, imprisonment, and detention of the pl'ff as aforesaid, was made and done by these def'ts under the authority and by the order of the then President of the United States, to wit, Abraham Lincoln, since deceased, whose orders as Commander-in-chief of the Armies of the United States, by the rules and regulations of the Army, these def'ts were bound to obey; and these def'ts further say that, the supposed arrest, imprisonment, and grievances in said declaration mentioned are the same arrest, imprisonment, and detention herein set forth, & none other: all which the def'ts are ready to verify. Wherefore the' pray judgement, &c.

By B. F. FIFIELD, *Att'y.*

27 And for further plea in this behalf, by leave of court first had and obtained, these def'ts say that said cause ought to be dismissed, because they say that, at the time of the committing of the several alleged grievances in said declaration mentioned, and for a long time, to wit, one year before and after that time, a gigantic rebellion was in existence and on foot against the laws and Government of the United States, and the public safety was greatly jeopardised & imperiled; and these def'ts further say that, it then and there became necessary to raise, and in fact large bodies of soldiers were raised, in the Northern States, & more especially in the military district embracing the second congressional district of Vermont, for the purpose of suppressing said rebellion, and in securing the public safety; and these def'ts further say that, at the time of said supposed grievances in said declaration mentioned, & for a long time, to wit, one year before and after that time, the def't Henry was a military officer in the service of the United States, to wit, a provost marshal within and for the military district em-
28 bracing said second congressional district of Vermont; and the said Beckwith was, during the same time an assistant provost marshal in the same district, acting in aid of the said Henry in the performance of his duties as such provost marshal. And these def'ts further say that, to wit, on the 20th day of November A. D. 1864, to wit, at Newbury, in the county of Orange, & in said military district of the second congres-

sional district of Vermont, the pl'ff then and there being charged with having been guilty of disloyal practices in aid of the then existing rebellion against the laws and Government of the United States, and with affording aid and comfort to the rebels against the authority of the United States, to wit, with enticing soldiers to desert from the Army of the United States, to wit, at Woodstock, in the county of Windsor, in said military district of the second congressional district of Vermont, to wit, on the 15th day of June, A. D. 1864, these defendants as such military officers, and not otherwise, did arrest the pl'ff, on the charges aforesaid; and these def'ts further say that, afterwards, to wit, on the same day, to wit, at Windsor, in the county of Windsor, in the
29 military district aforesaid, they did deliver over the pl'ff to the keeper of the State prison at said Windsor for safe custody until he could be brought before the civil tribunals of the United States within and for the district of Vermont, on the charges aforesaid, where he was detained on the charges aforesaid until afterwards, to wit, on the 1st day of May, A. D. 1865, when, to wit, at Woodstock in the county of Windsor, the pl'ff was brought before Warren C. French, he then being a United States commissioner within and for the judicial circuit of Vermont, and the pl'ff then and there being charged with the offences aforesaid, after a full hearing in the premises, was held to bail by said commissioner for his appearance before the United States circuit court then next to be held at Windsor on the 4th Tuesday of July A. D. 1865, to answer to the charges aforesaid, and to such things as might be then and there alleged against him as by said commissioner's record will more fully appear.

And these defendants further say that, at and from the time of said arrest up to the 4th Tuesday of July A. D. 1865, there was no session of a United States circuit court, nor of a grand jury in attendance
30 upon any United States court within the district and circuit of Vermont; and these def'ts further say that, in making said arrest, imprisonment, and detention the def't Henry acted in the military capacity of provost marshal, as aforesaid, and the said Beckwith in aid of him, the said Henry, and not otherwise; and that the arrest, imprisonment, and detention of the pl'ff, as aforesaid, was made and done under the authority, and by the order of Abraham Lincoln, then President of the United States, whose order as Commander-in-chief of the Armies of the United States, by the rules and regulations of the Army the def'ts were bound to obey; and these def'ts further say that, the supposed arrest, imprisonment, and grievances in said declaration mentioned are the same arrest, imprisonment, and detention herein set forth, and none other; all which the def'ts are ready to verify. Wherefore they pray judgment, &c.

By B. F. FIFIELD, *Att'y.*

Replication. General demurrer.

N. T. SHEAFE,
Att'y for Pl'ff.

31 And on the said 5th of July, A. D. 1870, the plaintiff filed his replication to the said pleas in the following words:

United States circuit court. July term. Circuit of Vermont.

ANDREW J. BEAN
vs.
D. N. BECKWITH & GILMAN HENRY.

And now comes the plaintiff, by his attorneys, and prosecutes his said

suits, &c., when, &c.; and, as to the defendants' plea by them first above pleaded, whereupon the' put themselves upon the country, doth the like.

By his attorneys: GEO. N. DALE & N. T. SHEAFE.

And for replication to the plea of the defendants by them secondly above pleaded, the plaintiff saith, that the said defendants, of their own wrong, and without the causes in said plea alleged, did assault the plaintiff, and him beat, bruise, and imprison in manner and form as the plaintiff in his said declaration hath thereof alleged against them, the said defendants; and thereupon puts himself on the country.

By his attorneys: GEORGE N. DALE & N. T. SHEAFE.

32 And for replication to the defendants' third plea, by them thirdly 'bove pleaded, the plaintiff saith that said plea, and the matters and things therein alleged, are insufficient in law to be replied unto by this plaintiff, or to have the right of this plaintiff to recover damages for the wrongs and injuries in plaintiff's declaration thereof alleged against them, the said defendants; and this the said plaintiff is ready to verify. Whereupon the plaintiff prays judgment for his damages for the wrongs and injuries in his said declaration alleged against them, the said defendants, and by the plaintiff most unjustly sustained, and for his costs.

By his attorneys: G. N. DALE & N. T. SHEAFE.

And afterwards, at the July term, A. D. 1870, of said court, the said cause came on for hearing before the Hon. Lewis B. Woodruff, circuit judge within and for the second circuit, and Hon. David A. Smalley, district judge within and for the Vermont district, on the pleadings as herein before set forth; and, after hearing counsel for plaintiff and
33 defendants, the cause was continued until the October term, A. D. 1870, of this court.

And afterwards, at said October term, A. D. 1870, the said cause was continued until the February term, A. D. 1871, of this court.

And afterwards, at said February term, the said cause was continued until the July term, A. D. 1871, of this court.

And afterwards, at said July term, A. D. 1871, the said cause was continued to the October term, A. D. 1871.

And at said October term, A. D. 1871, said cause came on again for hearing before Hon. Lewis B. Woodruff, circuit judge, and Hon. David A. Smalley, district judge, and thereupon, by consent of parties, it was ordered that the defendants have leave to file amendments to their third and fourth pleas; and thereupon amendments to said third and fourth pleas were filed, which amendments were in the following words:

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3d and 4th pleas, as amended.

34 And for further plea in this behalf, by leave of court first had and obtained, the def'ts say that pl'ff ought not to have and

maintain his said action, because they say that, at the time of the committing of the several alleged grievances in said declaration mentioned, and for a long time, to wit, one year before and after that time, a gigantic rebellion was in existence and on foot against the laws and Government of the United States, and the public safety was greatly jeopardized and imperiled; and these def'ts further say that it then and there became necessary to raise, and in fact large bodies of soldiers were raised, in the Northern States, and more especially in the military district embracing the second congressional district of Vermont, for the purpose of suppressing said rebellion and insuring the public safety.

And these defendants further say that, at the time of said supposed grievances in said declaration mentioned, and for a long time, to wit, one year before and after that time, the def't Henry was a military
35 officer in the service of the United States, to wit, a provost marshal within and for the military district embracing said second congressional district of Vermont, and the said Beckwith was, during the same time, an assistant provost marshal in the same district, acting in aid of the said Henry in the performance of his duties as such provost marshal.

And these def'ts further say that, to wit, on the 20th day of November, A. D. 1864, to wit, at Newbury, in the county of Orange, and in said military district of the second congressional district of Vermont, the pl'ff then and there being charged with having been guility of disloyal practices in aid of the then existing rebellion against the laws and Government of the United States aforesaid, and with affording aid and comfort to the rebels against the authority of the United States, to wit, with enticing soldiers to desert from the Army of the United States, to wit, at Woodstock, in the county of Windsor, in said military district of the second congressional district of Vermont, to wit, on the 15th day of June, A. D. 1864, these def'ts did arrest the pl'ff on the charges aforesaid; and afterwards, to wit, on the same day, to wit, at
36 Windsor, in the county of Windsor, in the military district aforesaid, they did deliver over the plaintiff to the keeper of the State prison, at said Windsor, for safe custody until he could be brought before the civil tribunals of the United States within and for the district of Vermont, on the charges aforesaid, where the pl'ff was detained, on the charges aforesaid, until afterwards, to wit, 1st day of May, A. D. 1865, where, to wit, at Woodstock, in the county of Windsor, the pl'ff was brought before Warren C. French, he then being a United States commissioner within and for the judicial district of Vermont, and the pl'ff being then and there charged with the offences aforesaid, after a full hearing in the premises was held to bail for his appearance before the United States circuit court then next to be held at Windsor, on the 4th Tuesday of July, A. D. 1865, to answer to the charges aforesaid, and to such things as might be then and there alleged against him, as by said commissioner's record will more fully appear.

And these defendants further say that, at and after the time of
37 the said arrest, up to the 4th Tuesday of July, A. D. 1865, there was no session of the United States circuit court, nor of a grand jury in attendance upon any United States court within the district and circuit of Vermont.

And these def'ts further say that in making said arrest, imprisonment, and detention, the def't Henry acted in his military capacity of provost marshal aforesaid, and the said Beckwith in aid of him the said Henry, and not otherwise; and that the arrest, imprisonment, and de-

tention of the pl'ff as aforesaid, was made and done bythese def'ts without unnecessary force and violence, under the authority and by the order of the then President of the United States, to wit, Abraham Lincoln, since deceased, whose orders as Commander-in-chief of the Armies of the United States, by the rules and regulations of the Army, these def'ts were bound to obey.

And these def'ts further say that the supposed arrest, imprisonment, and grievances in said declaration mentioned are the same arrest, imprisonment, and detention herein set forth, and none other, without this, that these def'ts violently forced the pl'ff within the State prison at said Windsor, and confined him in a dark and loathsome cell, and then and there beat and bruised the pl'ff with fist and clubs; and insulted him, and when so confined in said cell and prison, for the purpose of extorting money from the pl'ff, wickedly and maliciously threatened the pl'ff that they would inflict, or cause to be inflicted, greater injuries upon the pl'ff unless he would pay them a large sum of money: all which the def'ts are ready to verify. Wherefore, they pray judgment, &c.

By B. F. FIFIELD, *Att'y.*

And for further plea in this behalf, by leave of court first had and obtained, these def'ts say that said cause ought to be dismissed, because they say that, at the time of the committing of the several alleged grievances, in said declaration mentioned, and for a long time, to wit, one year before and after that time, a gigantic rebellion was in existence and on foot against the laws and Government of the United States, and the public safety was greatly jeopardized and imperiled; and these def'ts further say that it then and there became necessary to raise, and in fact large bodies of soldiers were raised, in the Northern States, and more especially in the military district embracing the second congressional district of Vermont, for the purpose of suppressing said rebellion and insuring the public safety.

And these def'ts further say that, at the time of said supposed grievances in said declaration mentioned, and for a long time to wit, one year before and after that time, the def't Henry was a military officer in the service of the United States, to wit, a provost marshal within and for the military district embracing said second congressional district of Vermont, and the said Beckwith was, during the same time, an assistant provost marshal in the same district, acting in aid of the said Henry in the performance of his duties as such provost marshal.

And these def'ts further say that, to wit, on the 20th day of Nov., A. D. 1864, to wit, at Newbury, in the county of Orange, and in the said military district of the second congressional district of Vermont, the pl'ff then and there being charged with having been guilty of disloyal practices in aid of the then existing rebellion against the laws and Government of the United States, and with affording aid and comfort to the rebels against the authority of the United States, to wit, enticing soldiers to desert from the Army of the United States, to wit, at Woodstock, in the county of Windsor, in said military district of the second congressional district of Vermont, to wit, on the 15th day of June, A. D. 1864, these def'ts, as such military officers, and not otherwise, did arrest the pl'ff on the charges aforesaid.

And these def'ts further say that, afterwards, to wit, on the same day, to wit, at Windsor, in the county of Windsor, in the military district aforesaid, they did deliver over the pl'ff to the keeper of the State prison at said Windsor, for safe custody, until he could be brought before the civil tribunals of the United States within and for the district of Ver-

mont, on the charges aforesaid, where he was detained on the charges aforesaid until afterwards, to wit, on the 1st day of May, A. D. 1865, when, to wit, at Woodstock, in the county of Windsor, the pl'ff was brought before Warren C. French, he then being a United States commissioner within and for the judicial circuit of Vermont, and the
41 pl'ff then and there being charged with the offences aforesaid, after a full hearing in the premises was held to bail, by said commissioner, for his appearance before the United States circuit court then next to be held at Windsor, on the 4th Tuesday of July, A. D. 1865, to answer to the charges aforesaid, and to such things as might be then and there alleged against him, as by said commissioner's record will more fully appear.

And these def'ts further say that, at and from the time of said arrest up to the 4th Tuesday of July, A. D. 1865, there was no session of a United States circuit court, nor of a grand jury in attendance upon any United States court, within the district and circuit of Vermont.

And these def'ts further say that, in making such arrest, imprisonment, and detention, the def't Henry acted in the military capacity of provost marshal as aforesaid, and the said Beckwith in aid of him, the said Henry, and not otherwise; and that the arrest, imprisonment, and detention of the pl'ff as aforesaid was made and done without unnecessary force and violence, under the authority and by the order of Abraham Lincoln, then President of the United States, whose order,
42 as Commander-in-chief of the Armies of the United States, by the rules and regulations of the Army, these def'ts were bound to obey.

And these def'ts further say that the supposed arrest, imprisonment, and grievances in said declaration mentioned are the said arrest, imprisonment, and detention herein set forth, and none other; without this, that these def'ts violently forced the pl'ff within the State prison at said Windsor, and confined him within a dark and loathsome cell, and then and there beat and bruised the pl'ff with fist and clubs, and insulted him; and, when so confined in said cell and prison, for the purpose of extorting money from the pl'ff, wickedly and maliciously threatened the pl'ff that they would inflict or cause to be inflicted greater injuries upon the pl'ff unless he would pay them a large sum of money: all which the def'ts are ready to verify. Wherefore they pray judgment, &c.

By B. F. FIFIELD, *Att'y.*

43 And thereupon the plaintiff filed a general demurrer to the pleas as amended.

And thereupon the case was submitted to the court on the demurrer to the pleas as amended and upon the former argument.

And thereupon the court ordered that a certificate of division of opinion be filed in the words and figures following:

United States of America, district of Vermont.

At a circuit court of the United States, begun and held at Rutland, for the district of Vermont, on the 3d day of October, A. D. 1871. Present, Hon. Lewis B. Woodruff and Hon. David A. Smalley.

ANDREW J. BEAN
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State of the pleadings.

This is an action for trespass and false imprisonment, and was

originally brought to a State court, to wit, Orleans County court, in the State of Vermont, and was thence removed, on petition of the defendants, to the United States circuit court for the district of Vermont, under the fifth section of an act of Congress entitled "An act relating to habeas corpus and relating to judicial proceedings in certain cases," approved March 3d, 1863, the defendants being military officers of the United States, and the action being brought for an arrest and imprisonment done by them during the rebellion, in 1864, under the authority of the President of the United States.

A copy of the declaration is hereto attached, and may be referred to.

The defendants, among other pleas, pleaded two special pleas, copies of which are hereto attached, and may be referred to, to each of which the plaintiff demurs generally, and the defendants join in demurrer.

This case coming on to be argued this term, it occurred as a question—

1st. Whether the first of said pleas, under all the facts therein
45 set forth, is a bar to the action.

2d. Whether, under all the facts set forth in the second plea aforesaid, the action ought to be dismissed by force of the provisions of an act to declare valid and conclusive certain proclamations of the President and acts done in pursuance thereof, or of his orders in the suppression of the late rebellion against the United States, approved March 2, 1867.

On which questions the opinion of the judges was opposed.

Whereupon a motion of the plaintiff, by his counsel, that the points on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided:

It is ordered that the foregoing state of the pleadings be certified, according to the request of the plaintiff, by his counsel, and the law in that case made and provided.

L. B. WOODRUFF, *Circuit Judge.*
D. A. SMALLEY, *Judge.*

46 UNITED STATES OF AMERICA,
District of Vermont, ss:

I, Bradley B. Smalley, clerk of the circuit court of the United States of America for the district of Vermont, in the second circuit, do hereby certify that the foregoing pages, numbered from one to forty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Andrew J. Bean against Gilman Henry and Daniel Beckwith, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Burlington, in the Vermont district, in the second circuit, this 24th day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the said United States the ninety-sixth.

B. B. SMALLEY, *Clerk.*

(Indorsed:) Andrew J. Bean vs. Daniel N. Beckwith & Gilman Henry. Record from circuit court for the district of Vermont.

(Indorsement on cover:) No. 516. Andrew J. Bean, plaintiff, vs. Daniel N. Beckwith and Gilman Henry. Certificate of division. Vermont C. C. U. S. Filed 11th December, 1871.

SUPREME COURT

OF THE

UNITED STATES.

No. 67.

ANDREW J. BEAN, Plaintiff,

vs.

DANIEL BECKWITH and

GILMAN HENRY.

Brief for the Plaintiff.

E. J. PHELPS,

Counsel.

SUPREME COURT

OF THE

UNITED STATES.

No. 67.

ANDREW J. BEAN, Plaintiff,

vs.

DANIEL BECKWITH and

GILMAN HENRY.

Brief for the Plaintiff.

E. J. PHELPS,

Counsel.

SUPREME COURT

OF THE

UNITED STATES.

No. 67.

ANDREW J. BEAN, Plaintiff,

vs.

DANIEL BECKWITH and GILMAN HENRY.

On certificate of division of opinion.

DISTRICT OF VERMONT.

BRIEF FOR THE PLAINTIFF.

STATEMENT.

This case comes up on a certificate of division of opinion, between the judges of the United States Circuit Court, for the District of Vermont.

The questions arise upon a demurrer to pleas.

The declaration is for an assault and battery, and imprisoning the plaintiff for seven months in the Vermont State Prison at Windsor. *Record, fol.* 2.

The defendants pleaded the general issue, and three special pleas.

Issue was joined on the first plea, the replication *de injuria* was filed to the second, and a general demurrer to the third and fourth.

The pleas demurred to, having been afterwards amended by leave of the Court, a general demurrer was again filed by the plaintiff; and upon the question of the sufficiency of the amended pleas, the Court were divided. *Record, fol.* 45.

These pleas are precisely alike, except in two particulars.

The third plea is technically a plea in bar, commencing with the formal words, "*that plaintiff ought not to have and maintain his said action.*" The fourth plea commences with the words, "*that said cause ought to be dismissed.*"

The third plea avers the arrest of the plaintiff to have taken place *on the 15th day of June*, 1864. The fourth plea states it to have been *on the 20th of November*, 1864.

Neither of these particulars is material to the questions to be considered.

The defence set up in the pleas, is the provisions of the Acts of Congress of March 3, 1863, (12 *U. S. Stat. p.* 756,) and March 2, 1867, (14 *U. S. Stat. p.* 432,) and the questions arising are :

1. Does the case, as presented, come within the terms of either of these statutes?

2. If it does, are those Acts, in such an application, in violation of the Constitution of the United States?

The *substance* of the pleas is this:

That the rebellion was on foot. That it became necessary to raise troops to suppress it, and that troops were raised for that purpose, in the second Congressional District of Vermont.

That defendants were military officers, one being a provost marshal, and the other an assistant provost marshal, in that District.

That plaintiff was charged with having been guilty of disloyal practices in aid of the rebellion, and with affording aid and comfort to the rebels, to wit, with enticing soldiers to desert from the army of the United States

That the defendant arrested the plaintiff on "the charges aforesaid," and delivered him to the keeper of the State's Prison at Windsor for safe custody, until he could be brought before the civil tribunals of the United States, on "the charges aforesaid."

That he was detained there, until the 1st of May, 1865, when he was brought before a United States Commissioner, and held to bail to answer to "the charges aforesaid."

That between the arrest and the time he was brought before the Commissioner, there was no term of the United States Circuit Court in Vermont.

That in making said arrest and imprisonment, "*the defendants acted in their military capacity afore-*"*said.*

That the arrest, imprisonment, and detention of the plaintiff, were made without unnecessary force and violence, "*under the authority and by the order of* "*the then President of the United States, Abraham Lin-*"*coln, since deceased, whose orders as Commander in* "*chief of the armies of the United States, by the rules* "*and regulations of the army, these defendants were* "*bound to obey.*" *Record, fol.* 34 *to* 43.

POINTS.

Upon demurrer to these pleas, the plaintiff maintains the following propositions:

I. That the averments in the pleas do not bring the case within the terms of the statutes in question, or either of them.

II. That if those statutes are to receive such a construction as would comprehend this case, then they are in contravention of the Constitution of the United States, and especially of articles 4, 5, and 6 of the amendments to the Constitution.

III. That in any event both the pleas are bad, as being pleaded to and assuming to answer the whole

declaration, while the provisions of the statutes, even if applicable and constitutional, would afford a defence to only a part of it.

I. The precise legal effect of the averments in the pleas, is first to be considered.

It is not stated in the pleas that martial law was in force in Vermont; that any invasion, insurrection, or disturbance was occurring, or any military operations being carried on; nor that the courts of justice were not in the full and unobstructed exercise of their jurisdiction. Nor that the plaintiff was in any way connected with the military or naval service of the government. Nor that he was engaged in any illegal act at the time of his arrest. It is averred that he was "*charged*" with certain disloyal practices. But not that the charge was made upon any legal or known authority, or upon any evidence or probable cause, nor that it was true.

It is admitted that the defendants, acting in their military capacity alone, and without any warrant, proceeding, or process, arrested and imprisoned the plaintiff, for twelve months according to the third plea, and for seven months according to the fourth. That he was confined during that time, not in any prison or place of detention authorized by law for the incarceration before trial, of persons charged with offences against the laws of the United States; but in the State's Prison of the State of Vermont, an

institution for the punishment of those convicted of felony under the laws of that State. That at the end of that period he was brought before a United States Commissioner, and held to bail; but with no averment that any complaint or proceedings were commenced against him, or any process issued.

And while it is charged, in conclusion, that these transactions were "under the authority and by the order of the President," no special or other order affecting the case, emanating from the President, or issued under his authority, is stated, set forth, or described.

The language of the pleas on this point is to be construed on demurrer, according to the rules of pleading.

The universal and necessary requirement in pleading is, that any precept or authority set up in justification of a trespass, must be specially set forth. It is the gist of the whole plea. And must be pleaded in traversable form, so that the plaintiff may be apprised of what is relied on, and may take issue upon it if he desires; and so that the Court may judge of its sufficiency.

This rule is elementary, and requires no citation of authority. And it is a rule without exception

These pleas therefore, contain no legal or sufficient averment of any order of the President, or under his authority, affecting the case. It is as if

a sheriff, sued for an arrest, should plead in bar that the act was done by virtue of process issued under the authority of the State of Vermont, without stating what it was. Such process, if pleaded, might afford a justification, but the plea would be bad for not pleading it.

The true construction of the pleas is, not that they set up any order in the premises, as a fact, but that they allege as a conclusion of law, that the action of the defendants in their military capacity is *ipso facto* by the order and under the authority of the President. The difference is most material.

II. Referring to the language of the statutes in question, it plainly appears that they do not reach any such case as is stated in the pleas.

The Act of March 3 1863, provides that "*any order of the President or under his authority*," shall be a defence to any actions &c., for any search, seizure or arrest &c., made &c., *under and by virtue of such order*, or *under color of any law of Congress*."

The Act of March 2, 1867, provides that all acts, proclamations, and orders of the President, or acts done by his authority, or approval, within the period, and in reference to the matters specified in the Act, shall be legalized and made valid, as if done under the previous express authority of Congress. And that no

person shall be held to answer in any Court "*for any "acts done or omitted to be done in pursuance or in aid "of any of said proclamations or orders, or by authority "or with the approval of the President.*

These acts are substantially alike, except that the first is prospective, and the second retrospective. Their intent and purpose are the same.

Their provisions extend only to acts done in pursuance of express orders or proclamations issued by the President, or under his immediate authority. Not to acts done at their own will and discretion, by those serving under the Executive.

Such persons, except in the execution of special orders, do not act under "the authority of the President," but under the authority of the law.

But even if in some sense, and in a remote degree, they may be said to represent "the authority of the President," it is not so for the purposes, or within the meaning of these statutes.

If this is not their true construction, then it follows that they were intended to protect against all judicial enquiry or redress, *every* act, committed by *any* person, acting under the Executive Department, in suppressing or punishing what *he* might regard as "disloyal practices," no matter how flagrant the outrage against life, liberty, person, or property.

Between these two constructions, there is no middle ground. One or the other must be adopted.

The "authority of the President," intended in the Acts, is either actual or constructive. If the latter, it has no limit except the limit of the numbers employed under the Executive Department of the Government. The obscurest subordinate becomes himself the President, so far as he may deem it advisable to go, in the putting down of "disloyalty."

An intention so unnecessary, so outrageous, so oppressive, so completely in derogation of common right and justice, as well as of the plainest constitutional provisions, will not be imputed to Congress, unless upon language that admits of no other possible construction.

But so far from the language of the statutes compelling such a construction, the plain and obvious import of their terms is against it.

If the official character of any person serving in the Executive Department was regarded as *ipso facto* conferring upon him "the order or authority of the President," within the meaning of these provisions, much of their language becomes unnecessary. Congress would in that view have simply enacted that such officer or person should not be held to answer for any act in his official capacity touching the matter referred to.

In the case of *Walker vs. Crane*, tried before the United States Circuit Court for the district of Vermont at the October term 1865, and defended by

the United States Government, the provisions of the Act of March 3, 1863, were relied on in justification of an arrest and imprisonment of the plaintiff by the defendant, a Provost Marshal of the United States, made upon his own discretion, and without any special authority or order from the President. The Court charged the jury, that the provisions of the act afforded no defence. A verdict having been rendered for the plaintiff, exceptions were taken on this point, and a writ of error brought in behalf of the defendant to the Supreme Court of the United States. Mr. Evarts was at that time Attorney General. By the assent of the government, the judgment was affirmed by the Supreme Court without argument.

See Record in that case.

III. If it were possible that the Acts in question should be so construed, as to authorize the arrest and imprisonment of a citizen, in a States Prison, for seven months, without warrant, process, charge, or trial, by any person serving under the Executive, and acting in his own discretion, without special authority, and where martial law was not declared, it would be too plain to admit of argument, that such provisions would be in violation of the Constitution.

It is not to be maintained, that the arbitrary will of such a person is the "due process of law;" that such a seizure is not "unreasonable;" or that under such circumstances the accused has "a speedy and public trial," or is "informed of the nature and cause of the accusation," or is "confronted with the witnesses against him."

IV. But even if the special order of the President is to be taken as sufficiently averred, both the acts in question, so far as they are held to authorize prospectively, or justify retrospectively, the arrest and inprisonment of the plaintiff, under the circumstances stated in the pleadings, are unconstitutional and void.

1. The fifth Amendment to the Constitution provides, that no person shall be deprived of his liberty "*without due process of law.*"

Can the mere order of the President then, (assuming it to have existed in this case,) be constituted by Congress "*The due process of law.*"

What is the meaning of these words?

It has been said of them by this court: "After "volumes spoken and written with a view to their "exposition, the good sense of mankind has at length "settled down to this, that they were intended to "secure the individual from the arbitrary exercise of

"the powers of government, unrestrained by the es-
"tablished principles of private right, and distribu-
"tive justice."

Bank of Columbia vs. Okeley, 4 *Wheat*. 235.

The highest court of New York has said, "Due "process of law undoubtedly means, in the due "course of legal proceedings, according to those rules "and forms which have been established for the pro-"tection of private rights."

Westervelt vs. Gregg, 12 *N. Y.* 209.

Says Mr. Webster: "By the law of the land is "most clearly intended, the general law; a law which "hears before it condemns; which proceeds upon en-"quiry, and renders judgment only after trial. The "meaning is that every citizen shall hold his life, "liberty, property, and immunities, under the pro-"tection of the general rules which govern society. "Everything which may pass under the form of an "enactment, is not therefore to be considered the law "of the land."

Webster's Works, *Vol.* 5, *p.* 487.

On this subject it has been further held by this court, that where terms had acquired a settled meaning in the English law, prior to the revolution, they are to be taken as used in that sense, in the Constitution.

Ex parte Wells, 18 *Howard*, 310.

The words "due process of law," have had in the English law a most clear and definite signification, ever since the date of *Magna Charta.*

By that instrument it was provided, that no freeman should be imprisoned, "*nisi per legale judicium parium suorum, vel per legem terrae.*" As translated by Mr. Reeve,—"by the judgment of his peers, or by "some other legal process or proceeding, adapted by "law to the nature of the case." And he characterizes it as "a very plain and explicit declaration as to "the protection every man might expect from the "laws of his country."

1 *Reeve's History of the Common law*, 284-5.

Mr. Hallam says of Magna Charta: "It is "still the keystone of English liberty. All that has "since been obtained is little more than a confirma- "tion or commentary; and if every subsequent law "were to be swept away, there would still remain the "bold features that distinguish a free from a despotic "monarchy."

"The essential clauses of Magna Charta are "those which protect the personal liberty and prop- "erty of all freemen, by giving security from arbi- "trary imprisonment, and arbitrary spoliation. No "freeman, (says the 29th chapter of Henry III's "charter, which as the existing law I quote in prefer- "ence to that of John, the variations not being very "material,) shall be taken, or imprisoned, or be dis-

"seized of his freehold, or liberties, or free customs, "or be outlawed, or exiled, or any otherwise de- "stroyed; nor will we pass upon him, nor send upon "him, but by lawful judgment of his peers, or by the "law of the land. We will sell to no man, we will "not deny or delay to any man, justice or right." "It is obvious that these words, interpreted by any "honest court of law, convey an ample security for "the two main rights of civil society. From the era "therefore of King John's charter, it must have been "a clear principle of our constitution, that no man can "be detained in prison without trial."

2 *Hallam's Middle Ages, Chap.* 8, *part* 2, *p.* 309-10.

The same author states the essential checks upon royal authority, that under Magna Charta had become firmly established at the accession of Henry VII, as part of the Constitution of England, as being five in number. And among them is this; "no man could be "committed to prison, but by a legal warrant specify- "ing his offence."

"The officers and servants of the crown, violating "the personal liberty or other right of the subject, "might be sued in an action for damages to be as- "sessed by a jury, or in some cases were liable to "criminal process; nor could they plead any war- "rant or command in their justification, *not even the* "*direct order of the King.*"

1 *Hallam's Cons. His., Chap.* 1, *p.* 18.

In the many successive re-enactments of these safeguards, that took place after the original Great Charter, the words "due process of law," are found used interchangeably and as synonymous with the term, "the law of the land."

Thus in the Stat. 28 of Edw. III. it is enacted, "That no man, of whatever estate or condition that "he be, should be put out of his land or tenements, "nor taken, nor imprisoned, nor disinherited, nor put "to death, without being brought to answer by due "process of law."

This statute, as well as the provisions of Magna Charta, was recited in the Petition of Right, (3 Car. 1); and by the 10th article of that petition it is prayed, "that no freeman in any such manner as is before "mentioned be imprisoned or detained." To which the king was compelled to assent.

Blackstone, (Vol. 1, p. 137,) says:

"To make imprisonment lawful, it must either "be by process of law from the Court of Judicature, "or by warrant from some legal officer having author- "ity to commit to prison."

And again: "The glory of the English law con- "sists in clearly defining the times, the causes, and the "extent, when, wherefore, and to what degree the "imprisonment of the subject may be lawful. This "it is which induces the absolute necessity of expres- "sing upon any commitment, the reason for which it

"is made, that the Courts upon a *habeas corpus* may "examine into its validity, and according to the cir- "cumstances of the case, may discharge, admit to bail, "or remove the prisoner."

3 *Blackstone* 133. *And see* 2 *Coke's Inst.*, 50.

The final overthrow of the last vestige of any claim on the part of the government in England to the right of arrest, except upon such process as is given by the general law of the land, occurred in 1765, in the celebrated contest touching the legality of general warrants.

It is unnecessary to refer to the well known history of this controversy.

The unanimous and repeated judgments of the highest courts in Great Britain, condemned as utterly illegal and unconstitutional, the arrest of any person under general warrants from the secretary of State. And very heavy damages were recovered by all the parties who had been so arrested. That practice never has been, and probably never again will be attempted in England.

May's Cons. History, Chap. 11.

Entinck v Carrington, 19 *St. Trials*, 1030,

Wilkes case, *Ib.* 1405.

Further authority might be cited, to an almost indefinite extent, to show the universal construction in England, from the earliest times down to the American Revolution, by courts, Parliament, and

people, of the term "*due process of law*," and its synonym, "*the law of the land.*" But even that already given, would seem to be unnecessary.

They have been uniformly held to prohibit all arrest or imprisonment, except under such legal process as is applicable to the case, by the general law of the land.

The repeated re-enactments, and the solemn declarations from time to time renewed on this subject, only show the tenacity with which that people from generation to generation clung to those cherished and celebrated safe guards of personal liberty which the Great Charter afforded, and the prompt courage with which they resisted and defeated every ncroachment upon them.

As further remarked by Mr. Hallam: "it was "not to bestow an immunity from arbitrary imprison- "ment, which is abundantly provided for by Magna "Charta, (if indeed it is not more ancient,) that the "statute of Charles II was enacted, but to cut off the "abuses by which the Government's lack of power, "and the servile subtilty of Crown lawyers, had im- "paired so fundamental a privilege."

Hallam's Cons. History, Chap. 13, *p.* 19.

When the Constitution of the United States was adopted, the true definition of those Latin words of Magna Charta, and of their English translation, had ceased for many centuries in England to be merely the

property of lawyers and judges. It had become a part of the history and constitution of the country, that he who ran might read. It was more than clear; it was sacred. Such were the words, so long and so well defined and understood, and so dear to every freeman, that were grafted into the American Constitution.

Says Chief Justice Taney: "The security against "imprisonment by executive authority, provided for "in the fifth article of the Amendments to the Con- "stitution, is nothing more than a copy of a like pro- "vision in the English Constitution, which had been "firmly established before the Declaration of Inde- "pendence."

Op. in Jno. Merryman's case, p. 16.

Nevermore, probably, will the meaning of that provision be questioned in an English court.

But at this day, in the consideration of a Constitution ordained by men who threw off the Government of Great Britain, *because* as shown in the Declaration of Independence, that Government had violated toward their colonists, those principles of Magna Charta they were compelled to observe at home; a Constitution expressly declared in its preamble to have been established to "*secure* the blessings of lib- "erty to ourselves and our posterity," and pervaded in every line by evidence of the same high purpose; it has been reserved for us to enquire, whether the "*lettres de cachet*" of the French monarchy are not

in accordance with th principles of the Great Charter; whether the arbitrary will or caprice of the Executive, is not after all, the "due process of law," and the "law of the land "

It is only the extraordinary claim recently set up on this subject, and the presence on the statute book of the Acts now in question, that afford any apology for entering upon an argument in support of propositions, that ought rather to be regarded as self-evident, and fundamental.

2 These Acts, if applicable to the present case, are equally in violation of several other provisions of the Constitution.

(*a*) The arrest of the plaintiff was an " unreasonable seizure." Because it was made without warrant or charge, and accompanied by circumstances of great and unnecessary severity and indignity.

(*b.*) He was not allowed " a speedy and public trial," but was confined for more than seven months, without indictment, information, trial, or examination. Though there is no reason stated in the pleas, why he might not have been brought, on any day in

It has been so expressly held by this court in the cases,

McCracken vs. Hayward, 2 *How.* 608.

Curran vs. Arkansas, 15 *How* 304.

4. The Act of March 2, 1867, (if it is material to consider it separately,) is further in conflict with the Constitution, in that it deprives the plaintiff of a legal right of action that had vested and become complete.

This suit was actually pending when that Act was passed; having been commenced on the 11th dry of August, 1865.

Record fol. 5.

Statutes may undoubtedly be retrospective, and may even impair certain vested rights.

But a right of action is not such a vested right as may be thus taken away.

"A vested right of action is property in the "same sense in which tangible things are property, "and is equally protected against arbitrary interfer- "ence. When it springs from contract, or from the "principles of the common law, it is not competent "for the legislature to take it away."

Cooley on Constitutional Limitations, p. 362, *and see decisions on this point collected in note* 5, *same page. See also*

1 *Kent's Com.* 455.

Hubbard vs. Brainerd, 35 *Conn.* 503.

V. But it has been maintained, that although the provisions in the Constitution now relied upon, may restrain the power of Congress in time of peace, in the event of war or rebellion they may be disregarded. And that the power given to Congress to declare war, authorizes the abrogation of those provisions, whenever in their judgment it becomes necessary for the maintenance of the war.

This proposition we deny.

1. The decision of this Court in the case of *Ex parte Milligan*, in 4th *Wallace*, must be regarded as conclusive to the contrary.

It is true it was made, so far as this point is concerned, by a divided Court. But such has been the case in respect to nearly all the great constitutional questions that have engaged the attention of this tribunal. The decisions on these questions have usually been majority decisions. In view of the nature and difficulty of the subjects, it could hardly be otherwise. But they have nevertheless been acquiesced in, and have become the settled law of the country. If these cases are now open to be reconsidered, because the views of the Court that disposed of them were not unanimous, then most of the work of construing the Constitution of the United States, still remains to be done.

2. But even if the questions discussed in that case are still to be again reviewed, it is submitted that there is nothing in the opinion of the minority of the Court, as there expressed, which is necessarily in conflict with the propositions we have thus far advanced.

The question in that case was as to the power of Congress to establish military tribunals in certain cases. The question now is, as to the power of arbitrary arrest. Freedom from such arrest is one of the natural and inherent rights of man. These rights are regarded under our system of government as inalienable. A man can no more part with them than he can sell himself into slavery. Any enactment to that effect would therefore be void, whether there was an express constitutional prohibition against it or not. For that cannot be alienated, which is not capable of alienation.

"These rights," says Chancellor Kent, "have "been justly considered, and frequently declared by "the people of this country, to be natural, inherent, "*and inalienable.*"

2 *Kent's Com.*, *p.* 1.

Hence grave objections have been urged against the insertion of any bill of rights in the Constitution. Lest it would seem to be implied that without such express prohibition, these natural rights of man might be invaded by legislation.

Whatever may be said therefore of other rights secured by the Constitution, no construction will be allowed that involves a surrender of these.

3. The power in Congress to disregard the requirements of the Constitution, is sought to be implied from the power conferred upon them to declare war, and "to make all laws that shall be necessary and proper for carrying into execution" that and the other powers given them.

(*a.*) But what laws are to be regarded as "necessary and proper" for that purpose?

Plainly, constitutional laws.

Otherwise the government is at once transformed into an unlimited and irresponsible despotism.

The Constitution is in force as well during war as during peace.

Nor is it to be conceived that constitutional laws are not adequate to the execution of all powers conferred. When the time arrives that the government cannot be maintained under the Constitution, then both government and Constitution will have come to an end, and must be replaced by better institutions.

(*b.*) It is impossible to imply a grant in direct opposition to a prohibition or refusal of such grant in the instrument from which it is sought to be implied.

Implications are made when they are so consistent with the language employed, as fairly to be included in, or necessarily to be inferred from it. How can this be, when the language of the same instrument expressly forbids the implication? And how can the Constitution be said to authorize by implication, what it prohibits in terms?

(*c.*) The power to declare war is in no wise exalted in the Constitution over other powers conferred upon Congress. No language is connected with it that raises any stronger or other implication, than arises in respect to all the other powers.

Nor is there anything in the duty of carrying on war, that justifies the assumption that greater powers were intended to be conferred for that purpose, than for the other necessary and principal purposes of government. Peace hath her functions, as well as "her victories, not less renowned than war."

It is true that war *may* involve the existence of the government. It is equally true that it rarely does. England has been for eight centuries the most warlike of nations. Yet no war since the Norman conquest has threatened her national life.

It is obvious, that if the extraordinary power claimed, results from the right "to declare war," it must result equally in case of every war, however remote or insignificant. And Congress might have suspended all the safeguards in the fifth Amendment

to the Constitution, as well during the pendency of the Mexican, or the Florida war, as during the rebellion.

If then, the power to declare war, and to pass necessary and proper laws for that purpose, carries with it by implication the power to disregard constitutional prohibitions and safeguards, whenever Congress shall deem it essential for the proper maintenance of a war, it follows by an inevitable logic, and with an equal propriety, that the same implication arises, whenever Congress may deem it necessary for the successful execution of any other of the powers conferred upon them.

Congress may "lay and collect taxes, duties, imports, and excises."

May "regulate commerce with foreign nations, "and between the several States."

May "coin money," and "provide for the punishment of counterfeiting," &c.

May "establish post offices and post roads."

May "constitute tribunals inferior to the Supreme Court."

May "punish piracies and felonies committed on " the high seas, and offences against the laws of na- " tions."

May " exercise exclusive jurisdiction over the * * * * seat of government," &c.

And the same general clause authorizing the making of " laws which shall be necessary and pro-

"per for carrying into execution the foregoing "powers," applies to these and the other powers granted to Congress, as well as to the power "to declare war."

When therefore, through popular or partisan excitement or prejudice, the collection of the revenue, or the punishment of offences against the law of nations, or the maintenance of the due functions of the judicial tribunals, or the just execution of any of the other enumerated powers is at any time interfered with or impaired, the majority in Congress, under their view of what is "necessary and proper," may violate in legislation all the provisions and prohibitions of the Constitution.

Such instances, where the strong arm of a vigorous despotism might undoubtedly work immediate justice, and facilitate the execution of the purposes of Government, are by no means remotely probable. They will doubtless from time to time arise. Their "necessity" is much more reasonable to anticipate, than the "necessity" of the outrage perpetrated upon the plaintiff, in a state so loyal and peaceable, and so remote from the scene of conflict as was Vermont during the rebellion.

If in such cases is applied the same rule of construction of the Constitution that is claimed under the power to declare war, that instrument is annulled and destroyed by the result of its own provisions.

And Congress, deriving its own existence under the Constitution, may upon the same plea of necessity, "the tyrant's plea" that is never wanting, abolish elections, perpetuate their own term of office, or re-elect themselves.

In short Congress becomes omnipotent. And government becomes anarchy.

(*d.*) It is upon no forced, strained, or doubtful construction of the Constitution, that powers so extraordinary, so dangerous, so fraught with inevitable mischief and oppression, should find warrant in the judgment of this high tribunal.

The opinion of the Court, as expressed in the case of *Wilkinson v Leland*, 2 *Pet.* 657, ought rather to be held decisive.

It is therein declared that

"The fundamental maxims of a free government "seem to require, that the rights of personal liberty "and private property should be held sacred. At "least no court of justice in this country would be jus- "tified in assuming, that the power to violate or dis- "regard them, a power so repugnant to the common "principles of justice and civil liberty, lurked under "any general grant of legislative authority, or ought "to be implied from any general expression of the "will of the people. The people ought not to be pre- "sumed to part with rights so vital to their se-

"curity and well being, without very strong and direct "expressions of such an intention."

"Of great importance," says Blackstone, (*Vol.* "1, *p.* 136) to the public, is the preservation of this "personal liberty ; for if once it were left in the pow- "er of any the highest magistrate to imprison arbi- "trarily, whenever he or his officers thought proper, "(as in France it is daily practiced by the Crown,) "there would soon be an end to all other rights and "immunities."

As said by Mr. Burke ; (*Burke's Works, Vol.* 2 *p.* 193) "all the ancient, honest, juridical principles "and institutions of England are so many clogs to "check and retard the headlong course of violence "and oppression. They were invented for this one "good purpose, that what was not just, should not be "convenient. Convinced of this, I would leave things "as I found them. The old cool headed general law "is as good as any deviation dictated by present "heat."

For further discussion of this subject, see

Op. of Ch. Jus. TANEY, *in case of John Mer ryman.*

Op. of Judge HALL, *U. S. Dis. Court for Northern N. Y., and preface thereto, signed by many members of the Bar, in case of J. D. Benedict.*

Op. of Judge SMALLEY, *U. S. Dis. Court for Vermont, in case of Anson Field.*

Griffin vs. Wilcox, 21 *Indiana Rep.*, 370.
Johnson vs. Jones, 44 *Illinois Rep.*, 142.

In both the cases last named, the Act of Mar. 3, 1863, now under consideration, was held to be unconstitutional.

To the same effect, though referring to a different statute, is the case of

Norris v. Doniphan, 4 *Met*, (*Ky.*) *Rep.* 385.
See also 2 *Kent's Com. Chap.* 1.

And it is believed, that aside from the views of the minority of this Court in the case of *Milligan*, no warrant can be found, in the decision of any Court, in the opinion of any jurist or statesman, or in the language of any respectable commentator, for the proposition that Congress may abrogate the provisions for the protection of personal liberty contained in the Constitution of the United States, under cover of the power conferred upon that body to declare war.

VI. Even if the Acts of Congress in question are constitutional in themselves, and applicable to the case, the pleas are still bad on demurrer. They assume to answer the whole declaration; while they only contain a defence to a part of it.

1. Both pleas, in their introductory part, are addressed to the entire action, and to the "several

alleged grievances in said declaration mentioned," without exception or qualification.

Record, fol. 34 *and* 39.

It is the introductory part of a plea that determines how much it assumes to answer.

"It is a rule that every plea must answer the "whole declaration or count, or rather all that it as- "sumes in the introductory part to answer, and no more."

"But if a plea profess in its commencement to "answer more than it afterwards answers, the whole "plea is bad, and the plaintiff may demur ; as if in "trespass the defendant assume in the introductory "part of his plea to justify an assault, battery, and "wounding : and afterwards merely shows that by "virtue of a writ he arrested the plaintiff, but shows "no excuse as to the wounding."

1 *Chitty's Pleadings*, 510.

The declaration in the present case, charges not only an arrest and aggravated imprisonment, but a violent assault and battery.

Record, fol. 3.

Nor is this mere matter of aggravation, that need not be answered. It is a part of the gist of the action.

If the authority claimed by the defendants for the arrest and detention of the plaintiff were ever so legal, it would not justify, nor is there anything else

stated in the pleas to justify, these additional trespasses.

Apparently aware of this, the pleader seems to have attempted to limit the effect of the plea to the arrest and imprisonment only, by reciting the other trespasses under an *absque hoc*, in the conclusion of the pleas.

But this recital has no such effect. It does not traverse those charges, nor enable issue to be joined upon them, nor except them from the attempted justification. It still leaves the pleas as in the introductory part, assumed answers to the whole declaration. So that if sustained upon demurrer, the judgment must be for the defendant, as to the entire action.

2. Neither would any legal authority to arrest and detain the plaintiff, that he might be tried for an offence, justify two of the material charges in the declaration, that are expressly admitted and attempted to be justified in the pleas.

The imprisonment of the plaintiff for so unreasonable a period without examination, trial, or bail. And his confinement meantime in the State's Prison, among convicts.

Had the arrest been made by the sheriff of the county, upon a legal warrant, it would have afforded no justification for those outrages.

"But this imprisonment, as has been said, is "only for safe custody, and not for punishment; "therefore in the dubious interval between the com- "mitment and trial, a prisoner ought to be used with "the utmost humanity; and neither be loaded with "useless fetters, or subjected to other hardships, than "such as are absolutely requisite for the confinement "only.

Blackstone, p. 300

The treatment of the plaintiff in these respects, was not merely illegal and inexcusable, it was shameful and inhuman.

In any view of the case, the plaintiff is entitled to judgment on the demurrer, and the questions certified by the Circuit Court should be determined in the negative.

E. J. PHELPS,
Counsel for the plaintiff.

Phelps

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

ANDREW J. BEAN, PLAINTIFF,
vs.
DANIEL N. BECKWITH AND GILMAN HENRY. } No. 67.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

BRIEF OF THE DEFENDANTS.

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Brief of the defendants.

The action in which the questions which have been certified to this court occurred, is trespass, for false imprisonment of the plaintiff in the State of Vermont, in the year 1864. It had been brought in a State court, and was transferred under the act of 1863, ch. 81 (XII, U. S. Stat., 756,) to the circuit court of the United States, at the instance of the defendants.

To the declaration there are, amongst others, two pleas by way of special traverse, (Rec. pp. 11–14,) the former of which is as follows:

"And for further plea in this behalf, by leave of court first had and obtained, the defendants say that *plaintiff ought not to have and maintain his said action*, because they say that, at the time of the committing of the several alleged grievances in said declaration mentioned, and for a long time, to wit, one year before and after that time, a gigantic rebellion was in existence and on foot against the laws and Government of the United

States, and the public safety was greatly jeopardized and imperilled; and these defendants further say that it then and there became necessary to raise, and in fact large bodies of soldiers were raised, in the Northern States, and more especially in the military district embracing the second congressional district of Vermont, for the purpose of suppressing said rebellion and insuring the public safety.

"And these defendants further say that, at the time of said supposed grievances in said declaration mentioned, and for a long time, to wit, one year before and after that time, the defendant Henry, was a military officer in the service of the United States, to wit, a provost-marshal within and for the military district embracing said second congressional district of Vermont; and the said Beckwith was, during the same time an assistant provost-marshal in the same district, acting in aid of the said Henry in the performance of his duties as such provost marshal.

"And these defendants further say that, to wit, on the 20th day of November, A. D. 1864, to wit, at Newbury, in the county of Orange, and in said military district of the second congressional district of Vermont, the plaintiff then and there being charged with having been guilty of disloyal practices in aid of the then existing rebellion against the laws and Government of the United States aforesaid, and with affording aid and comfort to the rebels against the authority of the United States, to wit, with enticing soldiers to desert from the Army of the United States, to wit, at Woodstock, in the county of Windsor, in said military district of the second congressional district of Vermont, to wit, on the 15th day of June, A. D. 1864, *these defendants did arrest the plaintiff* on the charges aforesaid; afterwards, to wit, on the same day, to wit, at Windsor, in the county of Windsor, in the military district aforesaid, they did deliver over the plaintiff to the keeper of the State prison at said Windsor for safe custody until he could be brought before the civil tribunals of the United States within and for the district of Vermont, on the charges aforesaid, where the plaintiff was detained, on the

charges aforesaid, until afterwards, to wit, 1st day of May, A. D. 1865, where, to wit, at Woodstock, in the county of Windsor, the plaintiff was brought before Warren C. French, he then being a United States commissioner within and for the judicial district of Vermont; and the plaintiff being then and there charged with the offences aforesaid, after a full hearing in the premises, was held to bail for his appearance before the United States circuit court then next to be held at Windsor on the 4th Tuesday of July, A. D. 1865, to answer to the charges aforesaid, and to such things as might be then and there charged against him, as by said commissioner's record will more fully appear.

"And these defendants further say that, at and after the time of the said arrest, up to the 4th Tuesday of July, A. D. 1865, there was no session of the United States circuit court, nor of a grand jury in attendance upon any United States court within the district and circuit of Vermont.

"And these defendants further say that, in making said arrest, imprisonment, and detention, the defendant Henry acted in his military capacity of provost-marshal aforesaid, and the said Beckwith in aid of him, the said Henry, and not otherwise; and that the arrest, imprisonment, and detention of the plaintiff as aforesaid, was made and done by these defendants without unnecessary force and violence, under the authority and by the order of the then President of the United States, to wit, Abraham Lincoln, since deceased, whose orders, as commander-in-chief of the Armies of the United States, by the rules and regulations of the Army, these defendants were bound to obey.

"And these defendants further say that the supposed arrest, imprisonment, and greivances in said declaration mentioned, are the same arrest, imprisonment, and detention herein set forth, and none other; without this, that these defendants violently forced the plaintiff within the State prison at said Windsor, and confined him within a dark and loathsome cell, and then and there beat and bruised the plaintiff with fist and clubs, and insulted him, and when so confined in said cell and

prison, for the purpose of extorting money from the plaintiff, wickedly and maliciously threatened the plaintiff that they would inflict or cause to be inflicted, greater injuries upon the plaintiff unless he would pay them a large sum of money, all which the defendants are ready to verify. Wherefore they pray judgment, &c."

The other plea is substantially in the same words, except that at its beginning, instead of the words italicised above, the defendants say "*that said cause ought to be dismissed:*" and in speaking of the arrest, the language is, "these defendants, *as such military officers, and not otherwise*, did arrest the plaintiff," instead of that italicised above in the same connection.

To these pleas the plaintiff demurred generally.

The questions which occurred are:

I. "Whether the first of said pleas, under all the facts therein set forth, is a bar to the action."

II. "Whether, under all the facts set forth in the second plea aforesaid, the action ought to be dismissed, by force of the provisions of an act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders in suppression of the late rebellion against the United States, approved March 2, 1867."

The act referred to in the second question is that of 1867, ch. 155, (XIV U. S. Stat., 432,) which consists of but one section, to wit:

"That all acts, proclamations, and orders of the President of the United States, or acts done by his authority or approval after the fourth of March, anno Domini eighteen hundred and sixty-one, and before the first day of July, anno Domini eighteen hundred and sixty-six, respecting martial-law, military trials by courts-martial or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States, or as aiders or abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of

war, or of affording aid and comfort to rebels against the authority of the United States; and all proceedings and acts done or had by courts-martial or military commissions, or arrests and imprisonments made in the premises by any person, by the authority of the orders or proclamations of the President, made as aforesaid, or in aid thereof, are hereby approved in all respects, legalized, and made valid to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings, and acts had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted, and expressly authorizing and directing the same to be done. And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or Territory of the United States, shall have or take jurisdiction of, or in any manner reverse, any of the proceedings had or acts done as aforesaid, nor shall any person be held to answer in any of said courts for any act done, or omitted to be done, in pursuance, or in aid of any of said proclamations or orders, or by authority or with the approval of the President within the period aforesaid, and respecting any of the matters aforesaid; and all officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises shall be held prima facie to have been authorized by the President; and all acts and parts of acts heretofore passed inconsistent with the provisions of this act are hereby repealed."

The effect of the demurrer is to admit that, if the facts alleged in the *inducements* constitute a defense, judgment is to be given for the defendants, inasmuch as the matters imputing *excess*, etc., are traversed. (Steph. Pl., 189.)

Under the *former* plea the statement of facts is relied on as a *justification;* under the *latter*, as bringing the defendants within the *indemnity* of the act of 1867, above.

ARGUMENT.

I. The facts amount to *justification.*

The admission is, that the charge under which the defendants arrested the plaintiff, was that of giving aid and comfort to rebels, by enticing soldiers to desert from armies in the field against them; and that, upon being arrested, the plaintiff was turned over to the keeper of the State prison in the county where arrested, and having subsequently been brought before a commissioner, his case underwent a preliminary hearing, and he was thereupon bound over to appear at court.

The term of the court to which he was bound commenced upon the fourth Tuesday, (i. e., the 25th day) of July, 1865. This action was begun on the 3d of August, 1865. It does not appear that at that time the prosecution had ended.

We submit, 1, that the act with which Bean was charged is a felony; 2, that, although the defendants were military officers, they retained such rights in connection with the arrest of suspected felons as they had in common with all private persons; 3, that where a felony has actually been committed by somebody, private citizens have a right to arrest all persons who they have a reasonable ground to suspect as guilty thereof; 4, also, as an alternative to the last proposition, that when it appears in the course of a suit that it has been brought to test the *bona fides* of an arrest upon which has been based a prosecution that still pended at the time of such bringing, such suit is premature.

1. The act charged is a felony.

The United States were engaged in a war so great as to tax their energies. Large armies of theirs were arrayed against large hostile armies, and collisions in arms were frequent. That concurrently with this state of facts, a citizen should be engaged in enticing soldiers to desert, was for him to give aid and comfort to the enemy. The *mite* thus contributed by him towards such a termination of the struggle as would be disastrous for his country, was contributed directly and distinctly. There is no occasion for construction or interpretation,

as such an act comes plainly within the solemn and restricted definition of treason contained in the Constitution. It *leagued* him in the *general conspiracy*, within the terms used by Chief Justice Marshall in *Ex-parte* Bollman, 4 Cr., 75 "It is not the opinion of the court that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

It is true that Congress passed acts during the war, which allowed of this offense being treated as a misdemeanor, in case the prosecuting officer should choose to frame an indictment so as not to describe the offender as a *citizen*, &c.; but, without calling attention to the obvious incapacity of a statute to withdraw from a particular class of criminality acts which the Constitution specifies as constituting that class, it is not unusual for statutes to ameliorate criminal law by affixing lighter punishment to an offense *described therein with an omission of certain characteristics* which the technicalities of the common law require to denote a parallel offense punished by it much more severely. Here the statute of 1863, ch. 75, (XII U. S. Stat., 735,) punishes with fine and imprisonment all *persons*, (to whatever country belonging) who, (in war or peace,) entice soldiers to desert. So the act of 1861, ch. 56, (XII U. S. Stat., 317,) punishes in the same way *persons* who shall *recruit soldiers* in any State of the United States to engage in armed hostility against the United States, and the act of 1862, ch. 195, (XII U. S. Stat., 589, punishes in the same way *persons* who shall incite, set on foot, assist or engage in any rebellion against the United States.

Neither of these statutes provides that, if the *person* guilty be a *citizen*, and the indictment be one proper in *treason*, he shall not be punished as a *traitor*. An English statute (cited in Gabbett's Cr. Law, vol. 1, 846,) upon the

similar subject of *seduction* of soldiers, expressly enacts that its provisions shall not exclude a trial of the offender for treason because of the same offense or fact. In view of the circumstance that with us the facts which make treason are enumerated in the Constitution, it would have been superfluous to insert a similar proviso inour legislation.

2. A military man retains all his rights and duties as a private citizen in connection with the arrest of suspected felons.

This principle of law seems to have been acted upon in the case of the arrest of Aaron Burr in 1806, by Lieutenant Gaines, and to have passed at that time without serious challenge.

The proposition perhaps neesd no authority; but we quote in its support an extract from the celebrated charge to the grand jury of Bristol, in 1832, by Lord Chief Justice Tindal, reported in 5 Carr. & Payne, 260, note. In speaking of the duty of suppressing riots, he there says, "And whilst I am stating the obligation imposed by the law upon every subject of the realm, I wish to observe that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still the citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the King, as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other. If the one may interfere for that purpose when the occasion demands it, without the requisition of a magistrate, so may the other, too."

The features of the case in reference to which this language was used, differ from those here; but we understand the principle asserted by the Chief Justice to be general; that, wherever the law makes it the right of the private citizen to become, of his own motion, active in suppressing crime, the soldier has the same right.

The above positions appear to us to be so clear that we do not deem it necessary to discuss under this head the special question presented by the facts, viz,

that the defendants were provost-marshals, and that they acted under the orders of President Lincoln. It is enough to say that in times of public danger it is eminently proper that the chief citizen should notify other citizens who hold offices which afford unusually good opportunities for observing those crimes which constitute the danger, to be particularly upon the *qui vive* for the execution of their duties as private citizens in arresting probable felons. In such a case the actual commission of a felony, (viz., rebellion,) by *some one*, is notorious; so that the President's order is like an advertisement by authority for the arrest of the concealed or fleeing actors in a larceny or homicide. In which case the following passage is quoted from a book of authority as pertinent:

"Felons are usually taken up upon descriptions in advertisements, and many an innocent man has been taken up upon such suspicion, but the mischief and inconvenience from this point of view is nothing compared with the interest which the public on the other hand have in apprehending felons, and bringing them to justice." (2 Gabbett's Cr. Law, 150.)

3. Where a felony has actually been committed by somebody, private citizens have a right to arrest all persons whom they have reasonable ground to suspect as guilty thereof.

For this principle we need delay the court no further than to cite the opinion of Chief Justice Tindal above, with *Beckwith* vs. *Philby*, 6 B. & C., 635, and the ordinary text-books on criminal law.

The inquiry remains, whether the defendants had reasonable ground to suspect the plaintiff.

This is determined by the fact, that after a *full hearing* of the matter, the commissioner held the plaintiff to bail to answer.

Maddox vs. *Jackson*, 4 Munford, 462.

Bostick vs. *Rutherford*, 4 Hawks, 90.

See also *Driggs* vs. *Burton*, 44 Vt., 124.

4. The defense set up in the last paragraph may be stated in another form, viz, that the present action was

brought before the prosecution set on foot by the arrest complained of had ended. The *inducement* shows that the prosecution was going on within ten days before the present action began. The burden of proving that it had ended was upon the plaintiff. (Roscoe, N. P., 769.)

The proposition here relied upon is generally connected with suits for *malicious prosecution*. *This* is not such a suit. We submit that the proposition has no necessary dependence upon the form of action. A leading reason why courts of justice require that the previous prosecution shall have ended in the acquittal of the plaintiff before he brings the civil action, is that it is indecent and tends to public confusion for one judicial tribunal to entertain a suit which may bring it into collision with another tribunal over which it has no appellate jurisdiction, or in reference to which the methods of appeal have not in the particular instance been resorted to. The effect of the special traverse and the demurrer is to bring the plaintiff to a *quasi new assignment* of his cause of action, from which it appears that he has been suing for what in substance was a *malicious prosecution*.

II. Under the second plea, we submit that the defendants are entitled to the benefit of the *indemnity* given by the act of Congress quoted above.

There is obviously a substantial difference as to the qualities of the respective powers exercised by a legislature in interfering between citizens to prevent or modify the enforcement of an existing contract, and in prohibiting the prosecution of a pending remedy for a *trespass*. In the former case a shock arises from the disappointment of a citizen whom previous legislation had led to employ his time and skill in gaining an advantage of which he is now deprived. He can say that he has been *misled*, and that if he could have anticipated the legislation, he would have provided for it. Yet, even as regards contracts, the occasion may be such as to warrant the interference complained of. Legal-Tender Cases, 12 Wall., 457.

A statutory indemnity against civil actions for past

torts, stands upon very different grounds. In such actions the plaintiff must show that the act for which he expects *damages* was done against his *will*; that he did not *plan* or *bring about* the state of things upon which his suit depends. The question therefore whether the public interest requires that civil actions shall no longer be maintained for certain *torts*, is very much the same whether the torts have or have not been already committed. In this case it cannot be said as in cases of contracts, that the interests of business and of that confidence which is so largely the basis of social prosperity require that time be afforded for preparation for the new state of things, so that people may *accommodate* themselves to the proposed change. The man who has been already injured seems to be no more affected by such legislation than he who is afterward injured.

Again, *trespasses* (which require *force and arms* for their commission,) are of the nature of crimes. There is no difference in point of principle between them and such *delicta* as are *public* offenses. Both classes concern, with varying shades of gravity, the public peace, and the line between them shifts with change of time or nation. Mr. Austin says: "The difference between *crimes* and *civil injuries*, is not to be sought for in a supposed difference between their tendencies, but in the difference between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party or his representative, is a *civil injury*. An offense which is pursued by the sovereign or by the subordinates of the sovereign, is a *crime*. * * * * In different countries, the line between Civil and Criminal is utterly different. In almost all rude societies, the domain of criminal law is extremely narrow; and for reasons which I shall show hereafter, it generally enlarges as society advances." (1 Jurisp. 417.)

That the damages recovered in actions for *trespass* to the person, are of the nature of *pœna* for one party and *solatium* for the other, administered upon *police* considerations, is illustrated by the history in England of

the maxim *actio personalis moritur cum persona.* This maxim which applied originally to all actions of *trespass*, was at first modified in regard to trespasses to personal property. Several hundred years elapsed before any other considerable change was made. In our own day only have the rights of *plaintiffs* in actions for trespass to the person been allowed to *survive*, and even now the liability of *defendants* in such cases ceases with their deaths. This legislation seems to go upon the idea that the right to *damages* which, at common law, was a sort of subsidiary police regulation, may in some respects be conformed to the rules which govern property. The general effect has been not to make it property, but (following the piece-meal and practical character of English amendments of law) only *quasi* property.

In the modern action for damages for injuries sustained by the killing of certain relatives, there is another illustration to the same purpose.

When the expression *vested rights* is used to denote the position toward damages of one who has been beaten, or whose husband has been killed, it is with a meaning very different from what it has in connection with a contract. In view of the discretion which the legislature reserves to itself upon all questions touching the peace of society, and which it cannot bind itself to abdicate, or to hold otherwise than with absolute freedom, such rights are rights entirely subordinate to the graver rights of society as to the same transaction. They are vested as against everybody but the sovereign. If public considerations, which must attend each one of such cases, coincide with private interests, the particular action in which this occurs will go on to judgment in favor of the party injured. This happens in the vast majority of actions. But there is always a chance that public considerations may intervene in opposition to private interests, and then the former has always prevailed. No government can be so free, or so well balanced as to prevent such interferences, any more than the occurrences which occasion them. And, indeed, it may well be said that the disposition of the government to redress such occurrences is a proof at once of its freedom and of its prudence.

It seems that these are arguments in addition to those showing that the Government may impair the obligation of contracts. The arguments in the latter class of cases are *a fortiori* applicable in cases of trespass; but besides these, cases of trespass are subject to reasons of their own.

Political liberty in the United States is generally regarded as an improved form of political liberty in England. Our Constitutions, General and State, may (for certain purposes) be regarded as great *remedial* statutes; the *old law*, and the *mischief* existing in England, or in the colonies anterior to the Revolution.

The general question here is as to the *privilege* (used in the sense which prevails in the Civil law) created by an act of Congress. There is no question as to what the act means. The only question is as to the power of Congress to confer and *impose* the privilege. That question seems to arise from regarding the United States either (1) as a *free* government, or (2) as a government of *enumerated powers*.

1. Considering the question as affecting a free government with a written constitution amendatory of English liberty, we remark that the *privilege* in question is one familiar to English history, and that there is nothing in the Constitution of the United States which expressly affects its allowance here.

For the extent of its allowance in England, we need only refer to the recent important, long-contested, and well-argued case of *Phillips* vs. *Eyre*, in the Queen's Bench, and afterward in the Exchequer Chamber. 4 Law Reports, Q. B., 225; 6th ibid, 1.

Ten statutes granting *indemnity* are cited in the case and notes as having been passed in England, (others in Ireland and the Colonies,) beginning with Edward II, and coming down to George II; thus running through more than four centuries, three of them occurring in the *constitutional age* of William and Mary.

The men who framed the State and National Constitutions were entirely familiar with legislation conferring *indemnity*. They had the matter of *privilege* as existing in England and the colonies, sharply before

them, and gave it a large part of their consideration. They directed against it, in one constitution or another, provisions as to *ex post facto* laws, laws impairing the obligation of contracts, laws disturbing vested rights, laws suspending the privilege of the writ of *habeas corpus*, bills of attainder, &c. *Indemnity acts* are mentioned nowhere. Those who argue that they are *prohibited*, do so under a suggestion that they are included under other *heads* which refer expressly to matters not better known than they, and which can include them only by *construction*.

It is said (Griffin v. Wilcox, 21 Indiana, 370) that this statute *deprives* the plaintiff of his *property without due process of law*, within the prohibitory words of the fifth amendment to the United States Constitution. A right to sue for damages for assault and battery is *sui generis*, and strictly neither *property*, nor even a *chose in action;* as may be seen by referring to the 14th section of the bankrupt act of 1867. Such a right, except under special legislation, does not *survive*, cannot be *assigned*, cannot be *seized* by creditors, and does not prevent an insolvent from being discharged. It is a very singular circumstance, if true, that the lawyers and statesmen who drew this amendment, and who knew how little the word *property* included such rights of action, and how common in English and Colonial history is legislation taking away such rights, should have left the protection of the holders of such rights to an amendment worded so ambiguously, at the same time that the use of the technical term by which such legislation is known in English history would have placed their meaning beyond doubt. Clark v. Dick, 1 Dillon, 9. We submit, in this connection, that no great struggle for liberty either in England or America has been against such legislation, and that it would have been unwise to prohibit Congress, at the close of civil strife, from smothering any residuum of passion and ill-will (otherwise within their jurisdiction) that haply may be raging under the disguise of private litigation.

We may also suggest that where suits of a certain

sort, touching the public peace, and therefore requiring public oversight, were notoriously subject in England to be interfered with by the legislature, and that with general acquiescence, *due process of law*, i. e., due proceedings by law, or *the law of the land*, is not violated by a resort to similar remedy here. Such interference is according to the only practicable and long established modes of public liberty. See Cooley, 351 et seq., in explanation of these terms.

In Drehman v. Stifel, 41 Mo., 184, this question is elaborately discussed in connection with an *indemnity* provision in the constitution of Missouri; and upon writ of error to this court, the decision below maintaining the validity of the provision was affirmed. 8 Wall., 595. See also State v. Gatzweiler, 49 Mo., 18. Grim v. Weissenburg, 57 Pa., 433. Hess v. Johnson, 3 W. Va., 645.

2. As the act of Congress concerns itself only in indemnifying United States officers against liabilities incurred in the colorable discharge of their duties as such, no objection can be made to it as being outside of the *enumerated powers* of the General Government.

We submit, therefore, that both questions be answered in the affirmative.

S. F. PHILLIPS,
Solicitor General.